Supreme Court of the United States

OCTOBER TERM, 1902.

No. 229.

EUGENE C. GORDON, FOR THE USE OF MARY G. ROPER, PLAINTIFF IN ERROR,

vs.

ARTHUR E. RANDLE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

This was an action in debt on two certain promissory notes tried in the supreme court of the District of Columbia, holding a circuit court division No. 2. An appeal from the judgment of the court in favor of the appellee was properly noted (R., p. 9), and all requirements of the rules of both the supreme court of the District of Columbia and the Court of Appeals of the District of Columbia were complied with for the proper perfecting of said appeal, but the court declined to sign the bill of exceptions, because the term in which the case was tried had not been prolonged by adjournment taken specifically in behalf of this particular case. Counsel for the

appellant, on the 7th day of January, 1901, had moved in open court that the term be prolonged by adjournment for the settlement of the bill of exceptions, but the motion was overruled on the ground that the October term had ended on the 31st day of December, 1900, and the January term had begun on the 1st day of January, 1901, although that was a legal holiday in the District of Columbia (R., p. 13). The appellant perfected his appeal in accordance with the rules of both courts, so far as he could without the bill of exceptions, and filed the transcript of the record in the Court of Appeals of the District of Columbia (R., p. 11), and after said appeal was docketed filed in the case his petition to the said Court of Appeals for a writ of mandamus requiring the justice who presided in said circuit court No. 2 to settle and sign the bill of exceptions, in order that the appeal might be heard and determined by the said Court of Appeals (R., pp. 11 and 12). The Court of Appeals set the petition for the writ of mandamus down for argument, and it was urged by counsel for the appellant that the October term had not ended when the motion for prolongation of the term by adjournment was made on the 7th day of January, 1901, and, further, that a formal motion for the prolongation of the term by adjournment was not necessary, as the rule of court provided that thirty-eight days should be allowed for the settlement of bills of exceptions, and that it was the duty of the court to prolong the term by adjournment for that purpose. The Court of Appeals denied the petition and dismissed it with costs, but gave no reasons for so doing and filed no written opinion on the questions involved (R., p. 14).

ERROR.

The writ of mandamus should not have been denied.

ARGUMENT.

The writ of mandamus was the proper remedy to require the judge to settle and sign the bill of exceptions.

The Chateaugay Ore and Iron Company, petitioner, 128 U. S., 557.

Ex parte Crane, 5 Peters, 190.

The writ should have issued and the hearing of the questions involved should have been had after a return thereto.

"And, further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which every one is entitled when it is the appropriate process for ascertaining the right he claims."

Kentucky *vs.* Dennison, 24 Howard, 98.

"Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular."

Lord Mansfield, Rex *vs.* Wilkes, 4 Burrows, 2539.

Ex parte Mackey, 15 S. C., 328.

The refusal of the writ left unsettled the questions of law sought to be determined by the petition, though they were not frivolous but of vital importance to the rights of the appellant, and that notwithstanding the provision of law—

"That the opinion of the said Court of Appeals in every case shall be rendered in writing and shall be filed in such case as a part of the record thereof."

27 Statutes at Large, 436, sec. 10.

WHEN DID THE OCTOBER TERM END?

Rule 3 of the supreme court of the District of Columbia was as follows:

The terms of the court shall be held as follows:
Of the general term on the—
First Monday of January.
First Monday of April.
First Monday of October.
Of the circuit courts on the—
First Tuesday of January.
First Tuesday of April.
First Tuesday of October.
Of the equity court on the—
First Tuesday of every month.
Of the district court on the—
First Monday of January.
First Monday of July.
Of the criminal courts on the—
First Tuesday of January.
First Tuesday of April.
First Tuesday of October.

Each term shall continue until the commencement of the next succeeding term.

The first Tuesday of January, 1901, was the 1st day of January, 1901, or New Year's day, and a legal holiday in the District of Columbia, and therefore a *dies non juridicus*.

Revised Statutes relating to the District of Columbia, sec. 993.

"The day on which the cause was tried and judgment rendered was a legal holiday, and hence was, as the term *holiday* imports, *dies non juridicus*."

Such being the case, the court had no authority to hear the cause and render judgment on that day, and would not have authority to do so, even though the express prohibition contained in section 2 of chapter 58, *supra*, had been omitted from the statute.

Lampe *vs.* Manning, 38 Wis., 674.
Michie *et al. vs.* Michie's Adm. *et al.*, 17 Gratt., 109.
Butler *vs.* Kelsey, 15 Johnson, 177.
Pulling *vs.* The People, 8 Barbour, 384.

"At common law, and since the earliest times, Sunday, it seems has been considered *dies non juridicus*, and all judicial proceedings on that day have, therefore, been held to be void."

24 A. and E. Encyclopædia, 574.

That this was a day upon which the court could do nothing is shown by the fact that the attendance of persons reporting was merely noted, and those not excused from serving were excused without qualifying (R., p. 12).

If the court could do nothing on Tuesday, the 1st day of January, 1901, it could not begin the January term, and the term must have begun on the first juridical Tuesday, or the 8th day of January, 1901. If this were not the case the January term might be begun on another day of the week than Tuesday, although the rule prescribes Tuesday.

Mr. Justice Hagner began the January term of the equity court on the first Wednesday of January, 1901, notwithstanding the provision of rule 3 (R., p. 12):

"Of the equity court on the—
"First Tuesday of every month."

In Wisconsin, in 1869, this difficulty was provided against by statute, which "declared that when the day for the meeting of the court should fall on a legal holiday, it should be adjourned to the following day."

In re Worthington, 7 Bissell, 457.

Likewise in Virginia:

Michie *et al. vs.* Michie's Adm. *et al.*, 17 Gratt., 111.

If the January term began on the first juridical Tuesday, the October term continued until the 8th day of January, 1901, and the motion made for the prolongation of the term on the 7th day of January, 1901, was within the October term, and should have been granted.

THE RULE OF COURT AUTHORIZED THE SETTLEMENT OF THE BILL OF EXCEPTIONS AFTER THE EXPIRATION OF THE TERM.

Supreme Court of the District of Columbia, in General Term.

JANUARY 27, 1900.

Ordered that section 2 of rule 54 and rule 55 of the common-law rules of this court be, and they hereby are, amended so as to read as follows:

SEC. 2. "The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in case of a trial begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term in his discretion in order to prepare a bill of exceptions."

55. "Every bill of exceptions shall be prepared by the counsel of the party tendering it and submitted to the counsel on the other side; and where a bill of exceptions is not settled before the jury retires, the counsel tendering it shall give notice in writing to the opposing counsel of the time at which it is proposed the bill of exceptions shall be settled, and shall also, at least eight days, exclusive of Sundays, before the time designated in such notice, submit to the opposing counsel the bill of exceptions so proposed to be settled, and the said exceptions shall be presented to the court within thirty-eight days, exclusive of Sundays, after judgment shall have been entered therein, unless the trial justice shall, for good cause shown, extend the time for the presentation thereof, and if the counsel cannot agree, it shall be settled by the justice who presided at the trial; and in that case the

justice shall be attended by the counsel on both sides, as he may direct. *Provided, however*, That all motions in arrest of judgment and for a new trial shall be submitted to the trial justice within fifteen days, exclusive of Sundays and legal holidays, from the date of the verdict, unless the time shall be extended by him for good cause shown. And if said motions shall not be submitted within said fifteen days, or the time extended as aforesaid, the same shall be deemed overruled by force of this rule without any order, and judgment entered accordingly."

By the COURT.

The purpose of the above-quoted rule was to allow thirty-eight days for the settlement of bills of exceptions, and in order to do so it provided that the term might be prolonged by adjournment.

Judgment in this case was entered December 14, 1900 (R., p. 8). The bill of exceptions was submitted to counsel on the other side on the 17th day of January, 1901, and notice given to the opposing counsel of the time at which it was proposed the bill of exceptions should be settled (R., p. 9). The bill of exceptions was presented to the court on the 28th day of January, 1901 (R., p. 13). Each step was taken within the time and according to the requirements of the rule.

This court has said that where there was a standing rule of court which authorized such approval, the bill of exceptions could be settled after the end of the term.

"No order was entered extending the time for its presentation, nor was there any consent of parties thereto, nor any standing rule of court which authorized such approval."

United States *vs.* Jones, 149 U. S., 262.

The only thing lacking was a perfunctory motion to be made on the last day of the October term for the prolongation of the term. This motion could not have been denied by the judge if made. It gave him no discretion to present the settlement and signing of a bill of exceptions by refus-

ing to prolong the term. It was not provided for by the rule of court.

The rule imposed a duty to prolong the term by adjournment for the purpose of settling and signing bills of exceptions, and gave no discretion to prevent the settlement of bills of exceptions by a refusal to prolong the term.

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done."

Supervisors *vs.* U. S., 4 Wallace, 447.
City of Galena *vs.* Amy, 5 Wallace, 708.
United States *vs.* Biertling, 20 Howard, 254.
Coe *vs.* Morgan, 13 Federal Reporter, 844.

"The word 'may' in a statute is sometimes used in a mandatory and sometimes in a directory and permissive sense. It has always been construed 'must' or 'shall' whenever it can be seen that the legislative intent was to impose a duty and not simply a privilege or discretionary power, and when the public is interested and the public or third persons have a claim *de jure*, to have the power exercise."

14 A. and E. Encyclopædia, 979.

In the case heretofore cited on the brief, The Chateaugay Ore and Iron Company, 128 U. S., 556, where the requirements of the rules relating to the settlement of bills of exceptions had been complied with, this court declined to consider the question of the ending of the term.

Ward *vs.* Cochran, 150 U. S., 603.

HOLMES CONRAD.
S. HERBERT GIESY.